No. 90-248

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SAN FRANCISCO FIRE FIGHTERS LOCAL 798, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO,
Petitioner,

VS.

CITY AND COUNTY OF SAN FRANCISCO, FONTAINE DAVIS, *et al.*, UNITED STATES OF AMERICA,
Respondents.

Supreme Court, U.S.
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On Petition For a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether a consent decree settling race and gender discrimination actions which meets established "fairness" criteria, and which fits squarely within the precedents of this Court for voluntary affirmative action programs, was properly approved by the District Court.

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STATEMENT OF THE CASE

A. Proceedings Below

The petition in this case represents a last gasp challenge to a Consent Decree that brings to a close, after a eighteen year period of virtually continuous litigation, minority and female challenges to the employment practices utilized by the San Francisco Fire Department (SFFD).[1]

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1 As stated by the District Court, "this litigation must be understood in conjunction with an earlier suit, *Western Addition Community Organization [WACO] v. Alioto, C 70-1335 WTS...*" App. to Pet. for Cert. ("Pet. App.") 31a. The first challenge to SFFD's employment practices occurred in 1970, in *Western Addition Community Organization (WACO) v. Alioto*, No. C-70-1335-WTS. It was a challenge, under 42 U.S.C. §§ 1981 and 1983, to the 1968 entry level examination. This action filed on June 24, 1970, resulted in a series of opinions that invalidated the entry level procedures for the SFFD for a period of five years. Initially, the District Court found that the challenged 1968 test had an adverse impact on minorities and had not been shown to be job related. See *WACO v. Alioto*, 330 F. Supp. 536, 539-40 (N.D. Cal. 1971).

Pursuant to the court's ruling, a new examination was developed and administered in the fall of 1971. That examination was again challenged by the plaintiffs in the *WACO* action. Once again the District Court held that the examination had adverse impact, and there was no showing that the examination was job related. The use of this examination and the resulting list of eligibles was therefore enjoined. See *WACO v. Alioto*, 340 F. Supp. 1351, 1356 (N.D. Cal. 1972).

In 1973, the District Court was again presented with the results of an entry-level examination. This examination also had adverse impact. Once more there was no showing that the examination was job related. At that point, after having been presented with three unsuccessful attempts to construct a valid entry level examination, the court ordered defendants to validate any entry level examination. See *WACO v. Alioto*, 360 F. Supp. 733, 740-41 (N.D. Cal. 1973).

Finally, in June of 1973, the District Court concluded, "The [Civil Service] Commission's dilatoriness in these matters and apparent stubborn insistence upon arguments and alternatives which this court has repeatedly found unacceptable, have created an intolerable situation . . . ." *WACO v. Alioto*, 369 F. Supp. 77, 80 (N.D. Cal. 1973), appeal dismissed as moot, 514 F. Supp. 542 (9th Cir.), cert. denied, 423 U.S. 1014 (1975). As a result, the court ordered one-for-one hiring of minorities and Whites until the list of minority eligibles was exhausted. Id. at 80-81. 2 (footnote continued on following page)

The challenged Consent Decree resolves two actions that contested long standing discriminatory hiring practices, promotional practices and terms and conditions of employment. The first case is *Fontaine Davis, et al. v. City and County of San Francisco*, No. C-84-1100 MHP, and it was filed on March 9, 1984. That action challenged the legality of the 1978 lieutenants examination, the 1982 entry level examinations, and the 1984 promotional examinations; it has only two sets of parties, plaintiffs Fontaine Davis, et al. and defendants City and County of San Francisco, et al. The challenged Consent Decree resolved all claims for relief requested in this action. Pet. App. 80a. No valid notice of appeal was ever filed with regard to this action; indeed, no party intervened in this action.[2] By order dated November 2, 1984, the District Court dismissed the part of the action regarding challenges to the entry level and promotional examinations as premature, and held the rest of the action in abeyance, including the challenge to the 1978 lieutenants examination. On November 11, 1985, the District Court reinstated this action, and on June 2, 1986, it

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The active phase of the *WACO* litigation was terminated by the entry of a consent decree on May 17, 1977. This decree acknowledged that plaintiffs had made out prima facie cases of race and national origin discrimination. It acknowledged that the City and County of San Francisco had repeatedly failed to show that the examinations were job related. It also set forth guidelines for the 1976 and subsequent entry level examinations. More importantly, the decree provided for a one year residency requirement as a prerequisite for any applicant for a position with the SFFD.

Pursuant to the WACO decree, another entry level examination was given in 1976, and that examination also had a clear adverse impact on Blacks. A challenge to the 1976 eligibles list was lodged solely under the WACO consent decree, but that challenge was rejected because the court determined that, while the examination had an adverse impact against Blacks there was no adverse impact against "minorities" in toto. WACO v. Alioto, No. C-70-1335 WTS, Memorandum and Order, June 9, 1978, p.3.

[2] Local 798 sought intervention in this action, but the District Court denied its intervention without prejudice to Local 798 seeking intervention at the remedy stage of the action on August 20, 1984. Local 798 never sought intervention in this action again.

consolidated this case with *United States v. City and County of San Francisco, et al.*, No. C-84-7089 MHP.

The second action is *United States v. City and County of San Francisco*, No. C-84-7089 MHP. This action was a classic pattern and practice action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, as amended. Intervention was granted solely in the second action to plaintiff/intervenors Fontaine Davis, et al., and two defendant/intervenors.[3] Indeed, the petition before this Court springs solely from Local 798's involvement as an intervenor in this second case.[4]

Based on plaintiff-plaintiff/intervenors Fontaine Davis, et al.'s motion, the District Court enjoined the use of the 1982 entry level examination to establish a list of eligibles for the SFFD on February 12, 1986.[5] The District Court bifurcated the trial of both actions to provide that challenges to the invalidity of the 1982 entry level examination, and the 1984 lieutenant and fire inspector examinations, would be tried first in November, 1986. The other issues were to be tried at a later date. On October 23, 1986, in open court, defendants City and County, et al. conceded the invalidity of the challenged examinations, and all lists of eligibles

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[3] The second defendant in intervention, *San Francisco Citizens for the Merit System, et al.*, sought to withdraw from the action and was allowed to withdraw on May 25, 1988. Except for a couple of cameo appearances since its withdrawal from the case, it has ceased to function as a party in either of these consolidated actions.

[4] Two appeals that ostensibly challenged the Consent Decree entered by the District Court were voluntarily dismissed in the Court of Appeals for the Ninth Circuit. The United States voluntarily dismissed its appeal on January 30, 1989. Likewise, certain individual members of the San Francisco Fire Department who were not parties to either action but who claimed to be adversely affected by the entry of the Consent Decree voluntarily dismissed their appeal in the Ninth Circuit on December 5, 1988.

[5] Plaintiffs-plaintiff/intervenors later successfully moved for partial summary judgment establishing the fact of adverse impact of the 1982 entry level examination on Blacks and women.

that had been developed from the challenged examinations were subsequently cancelled.

The District Court then requested the parties to attempt to settle the actions, and when no settlement could be reached, Fontaine Davis, et al. moved for summary judgment on the issue of the validity of the challenged examinations in both actions. The United States filed a similar motion for summary judgment soon thereafter. These motions were granted on February 26, 1987. *See United States v. City and County of San Francisco, et al., Fontaine Davis, et al. v. City and County of San Francisco et al.*, 656 F.Supp. 276 (N.D Cal. 1987) Pet. App. 104a - 139a.

The District Court entered injunctive relief, and it allowed for the interim race- and gender-conscious hiring of entry level firefighters -- provided that the SFFD so requested, and the SFFD so requested. Pet. App. 130a.

The District Court set the remaining matters for trial on November 10, 1987. Prior to trial on these matters, the California Court of Appeal for the First Appellate District issued an opinion in *City and County of San Francisco v. Fair Employment and Housing Commission*, 191 Cal. App. 3d 976 (1987), *review dismissed* (8/13/87). This case established the 1978 lieutenants examination to be invalid under the California Fair Employment and Housing Act, Cal.Govt.Code § 12940 et seq. Fontaine Davis et al. had challenged said examination in its complaints, and, based on *Parklane Hosiery Company v. Shore*, 435 U.S. 322 (1979), they moved for and were granted summary judgment on this issue in open court on October 21, 1987.

The parties had been involved in settlement negotiations during this time period, and immediately before the scheduled second trial date, defendants *City and County of San Francisco et. al. and Fontaine Davis et al.* entered into a proposed Consent Decree that

would settle all of the remaining litigation[6] which was lodged with the Court.

A fairness hearing was held by the District Court on December 22, 1987, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, where testimony was allowed and over one hundred written comments were received. In a 62-page Order dated June 10, 1988, the District Court approved the Consent Decree. Local 798 and the United States filed timely notices of appeal.

On May 31, 1988, Local 798 filed a Motion with the Ninth Circuit seeking to enjoin the implementation of the Consent Decree; that requested relief was denied by unpublished Order dated July 18, 1988. Local 798 did not seek relief from this Court after that denial. On or about October 15, 1988, Local 798 filed a second request with the Ninth Circuit to enjoin the enactment of one provision of the Consent Decree. That requested relief was denied, and again Local 798 did not seek relief from this Court after the second denial of injunctive relief. On December 4, 1989, the Ninth Circuit affirmed the District Court's approval and entry of the Consent Decree. On May 9, 1990, the Ninth Circuit denied Local 798's petition for rehearing and rejected its suggestion for rehearing *en banc*.

B. Facts Justifying Entry Of The Consent Decree

SFFD has a long history of blatantly excluding minorities, especially Blacks, and women from its ranks. No Blacks were hired by SFFD prior to 1955. SFFD did not hire another Black until 1967. SFFD had only 5 Black employees until 1971. In 1972, 15 Blacks were hired to be trained to become firefighters

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6 Section VI of the Consent Decree provided for a mechanism to resolve the claims of racial harassment and other types of racial discrimination. Pursuant to that provision, the District Court heard five days of testimony; then settlement was reached for all but three of the remaining 34 claimants, and the City and County agreed to pay damages in the aggregate amount of $962,000 to 31 of those claimants.

under the auspices of a federal training program entitled the Fire Service Technicians program, but no other Blacks were hired until 1974.[7] During this period of time, the SFFD had a staffing level of 1800 uniformed firefighters.

The exclusion of women from employment opportunities in SFFD was even more blatant. Women were not even allowed to apply for positions until 1976. No woman passed the physical agility test until 1982, and, after 1982, no woman had a high enough score to be eligible for hiring. A more compelling instance of the "inexorable zero" is hard to imagine. The first women finally entered SFFD in 1987, pursuant to the District Court's order authorizing interim relief.

At the time the lawsuits were filed, SFFD employed only 79 Blacks, 89 Hispanics, 34 Asians and no women out of a work force of 1408.

In the period since 1971, the United States District Court for the Northern District of California has found that nine SFFD entry-level and promotional tests had adverse impact on minorities and/or women and that three were invalid. The California Fair Employment and Housing Commission found a lieutenants examination invalid, and the City has conceded the invalidity of four more tests. This astonishing record is so extraordinary that the District Court has referred to SFFD's "now legendary inability to devise entry-level and promotional tests that are valid under Title VII." Order Granting Injunction, Aug. 25, 1988.

Thus, from 1968 through 1982, no SFFD entry level examination has been found to be job related, although each of the examinations had an adverse impact on protected classes.

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7 The 1974 date is significant because it is the year in which the District Court, in *Western Addition Community Organization [WACO] v. Alioto*, No. C-70-1335 WTS, ordered one-for-one hiring relief. See *WACO v. Alioto*, 369 F.Supp. 77, 81.

Another entry-level examination under the auspices of the *WACO* Consent Decree was given in 1982. It also limited the candidates for this examination to residents of the City and County of San Francisco. This examination had the all too familiar outcome vis-a-vis Blacks, Asians and Hispanics. The examination had two parts, a written verbal ability test and a physical agility test. The written component had an adverse impact on Blacks, Hispanics and Asians. The physical agility component also had an adverse impact on women, Hispanics and Asians.

Plaintiffs-plaintiff/intervenors Fontaine Davis, et al. in the instant litigation challenged the 1982 entry-level examination. The District Court determined that both components of the examination had an adverse impact on protected groups and enjoined the use of the list of eligibles that those components produced. The District Court also entered summary judgment against all defendants and petitioner Local 798 with regard to this examination. That determination by the District Court was never challenged by any party.

As of November, 1987, the City had still not developed a valid entry level examination, and over 55% of all minority firefighters had been hired pursuant to the *WACO* one-for-one hiring order. Indeed, a vast majority of SFFD's current minorities have been hired based upon court-ordered procedures.

SFFD fills all promotional positions from within and that is done by examination. SFFD has 352 permanent supervisory positions, and as of the date of the District Court's opinion approving the Consent Decree, none of these positions was held by a woman, none was held by an Asian, only 4 were held by Blacks, and 16 were held by persons identified as being Hispanic. Thus, the percentage of minority participation in the supervisory ranks was less than 6%. Moreover, these minorities were concentrated in the

first level supervisory rank, H-20 Lieutenant.[8]

The first examination for a promotional position that an overwhelming majority of Blacks and other minorities were eligible to take was given in 1978. Ten Black firefighters who took the 1978 H-20 examination challenged it, alleging violations of both the California Fair Employment and Housing Act and Title VII. The California Court of Appeal for the First Appellate District sustained the California Fair Employment and Housing Commission's determination of invalidity in *City and County of San Francisco v. Fair Employment and Housing Comm'n*, 191 Cal. App. 3d 976 (1987). The Court of Appeal determined that the examination had an adverse impact on Blacks and that the City had not established that the examination was job related. *id.* at 990. That determination became final on August 13, 1987.

After this ruling, the District Court entered summary judgment establishing the invalidity of the 1978 H-20 examination on the basis of collateral estoppel. No appeal was taken from that determination.

The City administered new promotional examinations for the positions of H-20, H-30, H-4, and H-6 in 1984.[9] The results of these examinations were contested in the both of the lawsuits. At the eleventh hour, after extensive pretrial activity, the City declared in open court that it would not defend the validity of two of the 1984 promotional examinations, and the Civil Service Commission cancelled the results of the H-20 and H-4 examinations as well as the previously described entry level examination. When settlement negotiations broke down, plaintiffs in both actions

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8 The breakdown of the supervisory ranks in fire suppression at the time of the filing of the suits and entry of the Consent Decree was as follows: Chief of the Department, Deputy Chief, Assistant Chief, Battalion Chief, Captain and Lieutenant.

9 H-20 is the first level supervisor, Lieutenant; H-30 is for the second level supervisor, Captain; H-4 is the position of Fire Inspector for the Bureau of Fire Prevention; and H-6 is the position of Inspector there.

moved for summary judgment, and the District Court found that these tests had adverse impact on minorities and granted partial summary judgment on this point.

Thus, three sets of promotional examinations have been determined to have adverse impact and to be invalid under various civil rights statutes. The time period spanned the years from 1978 until the entry of the Consent Decree at issue here.

To summarize, defendants truly have a "sorry history" of test discrimination. *United States v. City and County of San Francisco*, 656 F. Supp. 276, 287. Defendants' "unenviable record of behavior reaching back nearly two decades," id., includes six entry level and three promotional tests which have been found to have adverse impact on protected groups. Three of these tests have been found invalid by the District Court, one has been found invalid by the California Fair Employment and Housing Commission, and defendants have conceded the invalidity of four others in open court. After "twenty years of indifference and failure to produce valid tests," Memorandum and Order Approving Consent Decree, Pet. App. 71a, it is no wonder the District Court labelled defendants' testing record "legendary," and that both the District Court and the Ninth Circuit determined that the entry of the challenged Consent Decree is warranted.

REASONS FOR DENYING THE WRIT

As is evident, the Consent Decree at issue is the result of years of arduous, hard-fought litigation. The relief it provides is necessitated by the City's longstanding failure "to come up with valid employee selection procedures despite court orders, an earlier consent decree and a series of promises," Pet. App. 71a, as well as the "long history and extensive facts demonstrating past discrimination," Pet. App. 77a. Because the Decree meets settled "fairness" requirements, and clearly comports with the requirements of the equal protection clause, U.S. Const. amend. XIV, § 1, as well as Title VII, petitioner's challenges to it are meritless.

Consent decrees must be found by the district court to be "fundamentally fair, adequate and reasonable." *Officers for Justice v. Civil Service Comm'n.*, 688 F.2d 615, 625 (9th Cir. 1982), *cert. denied sub. nom. Byrd v. Civil Service Comm'n of City and County of San Francisco*, 459 U.S. 1217 (1983). In this instance, both the District Court and the Ninth Circuit found this Decree to satisfy this standard. Pet. App. 65a - 69a.

This Consent Decree, moreover, fits well within the substantive parameters established by this Court for an employer's voluntary adoption of affirmative, race-conscious relief. It is established that governmental entities may utilize race-conscious remedies needed to correct past and present discrimination, *United States v. Paradise*, ___ U.S. ___, 107 S. Ct. 1053 (1987), but that a municipality's affirmative action plan must pass both constitutional and Title VII muster, *Local 93, Int'l Assn. of Firefighters v. City of Cleveland*, 473 U.S. 501, 517 n.8 (1986).

From the standpoint of the equal protection clause, the remedial purpose of the Decree is one in which "[t]he government unquestionably has a compelling interest," *Paradise*, 107 S. Ct. at 1065. In equal protection analyses of voluntary affirmative action programs, this Court has looked to whether there exists "a strong basis in evidence . . . that remedial action was necessary." *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 277 (1986)

(plurality opinion of Powell, J.). Here, where all Department hiring is entry-level and non-skilled, this "strong basis in evidence" or "firm basis" test may be met by proof of statistical imbalances sufficient to make out a Title VII prima facie discrimination case, see, e.g., *Wygant*, 476 U.S. at 292 (O'Connor, J., concurring); *City of Richmond v. J. A. Croson Co.*, ___ U.S. ___, 109 S. Ct. 706, 725 (1989); *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977). Here, as the District Court found and the Ninth Circuit affirmed, the stark statistical disparities described above provide the requisite showing. Pet. App. 70a. Along with the City's "legendary" inability to promulgate lawful testing procedures and its failure to correct the racially hostile environment in the Department, these disparities certainly satisfy the "strong basis in evidence" test.

Moreover, under the analysis established in *Paradise*, the Consent Decree is "narrowly tailored" to its purposes. The record amply demonstrates that the affirmative relief the Decree provides is plainly necessary; the "sorry" history of the Department's inability to correct its longstanding legacy of discriminatory testing provides no alternative. As the District Court noted:

> Affirmative remedies are required because the City has proved unresponsive to its duties under Title VII and the injunction of this court to come up with valid employee selection procedures. Affirmative race-conscious relief is the only effective means to assure the enjoyment of equal employment opportunity and to prevent further delays by the City. [Citations omitted.]

Pet. App. 70a. Furthermore, the terms of the Decree are highly flexible, as they set no quotas for affirmative hiring, only goals expressly contingent upon the availability of qualified personnel. See, e.g., Pet. App. 68a, 74a, 76a, 83a. The Decree is temporary; as amended by the Court of Appeals, it will terminate as soon as its purposes have been attained, but in any event no later than seven years from its entry. Pet. App. 16a. Its long-term hiring goals are tied to the proportion of minorities in the San

Francisco work force, Pet. App. 82a - 83a, with a slightly higher short-term hiring rate of the sort previously upheld by this Court, see *Paradise*, 107 S. Ct. at 1071. Lastly, the Decree does not unacceptably burden innocent third parties; indeed, far from requiring that non-minorities be laid off or barring their advancement, the Decree has already resulted in 36 promotions (out of the 81 total authorized by the Decree) for White males. Pet. App. 18a.

Likewise, for many of the same reasons, the Consent Decree fulfills the requirements of Title VII. The statistical disparities within the Department with respect to minorities and women bear out the "manifest imbalance" required of voluntary affirmative action programs by *Johnson v. Transportation Agency, Santa Clara County*, ___ U.S. ___, 107 S. Ct. 1442, 1451-52 (1987). And, under the standards first set out in *United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979), the Decree neither "unnecessarily trammels" the interests of non-minority employees or absolutely bars them from job opportunities, nor is it intended to maintain a racially balanced workforce. As to the first of these considerations, the Decree most assuredly did not mandate "the discharge of white workers and their replacement with new black hires," *id.*; moreover, because the examinations at issue were invalid, no "legitimate firmly rooted expectations" as to hiring or promotion could have been disturbed, *Johnson*, 107 S. Ct. at 1455. And, as already explained, White male firefighters have been benefitted by the promotions provided for by the Decree, and remain eligible for future promotions as well. As to the second of the concerns posed in *Weber*, the Decree's temporary nature proves that it is not aimed at maintaining a particular racial balance.

As a threshhold matter, this Court should not grant the requested writ because, regardless of the outcome of this action, the Consent

Decree at issue would still be enforced and enforceable.[10] Action by this Court would be analogous to a situation in which adequate state grounds existed, and thus one in which the Court would in effect be rendering an advisory opinion. *See*, e.g., *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1954) (Court will not review state court judgments resting on adequate and independent state grounds; if same judgment were subsequently rendered by state court after Court corrected its views of federal laws, Court review could amount to no more than advisory opinion); see also *Fay v. Noia*, 372 U.S. 391, 428-30 (1963).

In addition, another preliminary consideration lies with petitioner's apparent central concern – the promotion of individuals to the rank of lieutenant pursuant to the Consent Decree. Since the entry of the Decree on June 10, 1988, all but one of these lieutenants have become permanent for all purposes in the Department. Thus, action by this Court could upset the supervisory structure of the Department. Indeed, such action would be palpably unfair and inequitable where it would impact upon incumbents. *See Romasanta v. United Airlines, Inc.*, 717 F.2d 1140 (7th Cir. 1983) *cert. denied*, 466 U.S. 944 (1984) (retroactive seniority denied because of adverse impact on incumbents and members of protected classes); *Brieseno v. Central Technical Community College Area*, 739 F.2d 344 (8th Cir. 1984) (reinstatement denied where would affect incumbent); cf. *Spagnuolo v. Whirlpool Corp.*, 717 F.2d 114, 119 (4th Cir. 1983) (reinstatement order reversed under ADEA because it would require displacement of innocent incumbent).[11]

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10 As set forth above, no party successfully intervened in the *Fontaine Davis, et al. v. City and County of San Francisco* No. C-84-1100 MHP action. Therefore, there is and can be no challenge to the Consent Decree in that matter. It is axiomatic that only a party may appeal from a judgment or order of the district court, *see* Stern, *Appellate Practice in the United States* (2d ed.) 74 (1989).

11 Similarly, this case may be considered to be moot. The appointment of the 81 lieutenants under the Consent Decree in essence moots out petitioner's contentions. This is a facial attack on a consent decree; it is not a case where

Petitioner's specific contentions are addressed separately below.

I. The Court Of Appeals Applied The Proper Standards Of Review, Including Strict Scrutiny Analysis, To The District Court's Approval Of The Consent Decree.

Petitioner disingenuously would persuade this Court that the Ninth Circuit failed to apply "strict scrutiny" analysis in its approval of the Consent Decree, as required by *Croson*, 109 S. Ct. at 719-20. This assertion, however, is not only meritless; it is deceptive.

In its carefully structured opinion, the Court of Appeals first considered the "fairness" aspect of the Consent Decree -- i.e., the standard of review applicable under Fed.R.Civ.P. 23(e) pertaining to the settlement of class actions.[12] Citing to Officers for Justice, the Court noted that the District Court must find the proposed settlement to be "fundamentally fair, adequate and reasonable." It also observed that the District Court's approval may only be reversed given "a strong showing that [such approval] was a clear abuse of discretion." Pet. App. 9a - 10a.

Having concluded that the District Court did not abuse its discretion in finding the Consent Decree to be fair, the Court of Appeals then proceeded to the "constitutional and statutory considerations" step of its legal analysis, finding that the Consent

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there have been complaints that petitioner has been discriminated against. Instead, petitioner seeks to attack the race- and gender-conscious remedies afforded in the Consent Decree. Thus, there is no question of there being any continuing remedy to be provided to petitioner. A more appropriate challenge to the alleged discriminatory impact of the Consent Decree is presently before the United States District Court for the Northern District of California in an action styled *Ronald J. Van Pool, et al. v. City and County of San Francisco, San Francisco Fire Department, and the Civil Service Commission of the City and County of San Francisco, No. C-89-4304 MHP.*

12 Fed.R.Civ.Pro. 23(e) provides in relevant part that "[a] class action shall not be dismissed or compromised without the approval of the court."

Decree met the "strict scrutiny" test required by the equal protection clause.[13] Pet. App. 11a - 16a. Indeed, the Court of Appeals' step-by-step equal protection analysis cited with approval the District Court's finding of a "compelling governmental purpose" behind the City's adoption of the Decree. Pet. App. 12a. Further, it specifically found there was sufficient evidence to justify the relief granted and that, with the exception of the fixed seven-year duration of the Consent Decree, the Decree was "narrowly tailored" to meet its remedial purposes. Pet. App. 13a - 16a.

The undisputed record therefore makes plain that the Court of Appeals did independently apply a strict scrutiny analysis in affirming the District Court's approval of the Consent Decree. Thus, the question presented by petitioner to this Court is wholly illusory and undeserving of review.

II. Even If The Question Of The Relevant Labor Market Were Appropriate For Decision By This Court, It Is Undisputed That The City And County Of San Francisco Was The Department's Labor Market During The Period In Question, And Therefore The District Court Correctly Used It As Such.

It is well-settled that, ordinarily, this Court does not decide questions not raised or involved in the lower court. *See*, e.g., *Duignan v. United States*, 274 U.S. 195, 200 (1927) ("It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed"); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (Court refused to consider question raised in petition for certiorari but not before Court of Appeals); *Delta Airlines v. August*, 450 U.S. 346, 362 (1981) (question not raised in Court of Appeals not properly before the Court). Exceptions to this rule will be made only in unusual situations, such as where an error if not reviewed

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13 At this point in its opinion, the Court of Appeals also found the Consent Decree to fall within the requirements for voluntary race-conscious remedies under Title VII. Pet. App. 17a - 19a.

would "seriously affect the fairness, integrity or public reputation of public proceedings," *Connor v. Finch*, 431 U.S. 407, 421 n.19 (1977), or where a change in controlling law has occurred after the filing of a petition for certiorari, see, e.g., *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 896 n.7 (1984), or where the respondent has not objected to its decision and the issue is properly raised in another petition for certiorari currently pending before the Court, *see Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980).

As is clear from the briefing before the Court of Appeals, all parties including petitioner took it as assumed that the relevant labor market for statistical comparisons was that of the City and County of San Francisco.[14] This is hardly surprising given the undisputed fact that, as the District Court pointed out in its June 10, 1988 order, "[r]esidence in the City has always been a prerequisite for employment in the SFFD . . ." Pet. App. 71a. As such, this issue was neither joined below nor considered by the court below.

In any event, petitioner's citations to *Hazelwood; Wards Cove Packing Co. v. Atonio*, ___ U.S. ___, 109 S. Ct. 2115 (1989); *Associated General Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987); *Williams v. City of New Orleans*, 729 F.2d 1554 (5th Cir. 1984); and *Hammon v. Barry*, 826 F.2d 73 (D.C.Cir. 1987), lend it no support. These cases simply stand for the well-established proposition that the proper labor market for comparison is that which the employer actually utilized. As noted above, it has never been disputed in this litigation that, at all relevant times, there was a San Francisco residency requirement for applicants for positions in the Department.

Petitioner cites *Cooperrider v. San Francisco Civil Service Comm'n*, 97 Cal. App. 3d 495 (1979), in support of its assertion that the San Francisco "standard metropolitan statistical area" is the

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14 *See*, e.g., Appellant's Opening Brief at 41-42; Brief of Appellee City at 20 and 28; and Brief of Appellees Davis, et al. at 24 and 46-47.

proper labor market for comparison purposes, despite the fact that a San Francisco residence requirement has historically applied to Department applicants.[15] As is readily apparent, however, petitioner in effect asks this Court to adjudicate the wholly separate and fact-bound issue of whether the Department's ongoing residency requirement is unlawful as claimed. This Court should decline that invitation.

Because this question was not raised in the court below, because the applicable law is settled, and moreover, since it is undisputed that the City and County of San Francisco was in fact the labor market from which applicants came during the relevant time periods, this question is not appropriate for review by this Court.

III. The Consent Decree On Its Face Requires That Only Qualified Firefighters Be Hired Or Promoted.

Petitioner baldly asserts that the Consent Decree required or permitted the promotion of "unqualified" individuals to the rank of lieutenant "based upon the scores achieved by these firefighters on an admittedy [sic] invalid examination [i.e., the 1984 lieutenant's examination]." Pet. for Cert. 21. This contention is misleading and specious, and does not merit review by the Court.

On its face, the Consent Decree states:

> The hiring and promotional objectives set forth herein are goals rather than quotas. Nothing herein shall be interpreted to require the hiring or promotion of unqualified persons.

Pet. App. 83a. Moreover, in its Memorandum and Order approving the Decree, the District Court noted that its goals "are

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15 The Ninth Circuit recently upheld the affirmative action plan of another California municipality that used an identical city residency requirement. *Higgins v. City of Vallejo*, 823 F.2d 351 (9th Cir. 1987), *cert. denied*, ___ U.S. ___, 109 S. Ct. 1310 (1989).

expressly subject to the availability of qualified applicants," Pet. App. 68a; that "[p]ast performance and work history will also be considered in making the promotion decision," Pet. App. 74a; and that "[a]ll candidates must be qualified; the decree does not mandate, nor does it permit, blind hiring." Pet. App. 76a. Consistent with this, counsel for the City assured the District Court at the December 22, 1987 fairness hearing that the Department would undertake an

> [i]ndependent assessment of each of the persons who are promoted pursuant to the decree and will promote only those persons who are found to be qualified based upon an assessment of their work histories . . . their performance evaluations and so on.

Transcript of 12/22/88, Fairness Hearing at 32:9 - 14. Because the Department subsequently determined that all but one of the firefighters promoted to lieutenant pursuant to the Decree were qualified by virtue of successfully completing the longstanding probationary requirements, petitioner's contention is patently incorrect.

At bottom, petitioner's challenge relies solely on the unfounded assumption that promotional decisions must be made on the basis of competitive examinations -- even in preference to supervisory evaluations and other work records. This assumption is of course erroneous. Particularly since the 1984 lieutenants examination was only one of many factors considered, and was never used to establish a right to promotion, the question presented simply does not arise in this case.

Lastly, petitioner's claim that even the carefully limited use that was made of the 1984 examination somehow irreparably infected the promotional decisions that were reached ignores the fact that the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.1 et seq. (1989), provide that the invalidity of a selection device is remedied by utilizing it in a manner that counteracts its unlawful discriminatory effect. 29 C.F.R. §§

1607.3B, 1607.5G (1989). In the instant case, where those minority applicants who scored higher on the examination than others of their racial group simply gained some advantage in their individualized, multi-factored promotional decisions, petitioner can hardly argue that those eventually chosen for promotion were either unqualified or invalidly selected.

Because this question rests on questionable assertions of fact and, moreover, involves no substantial issue of law, it does not merit this Court's review.

IV. The District Court Properly Approved The Consent Decree's Provision Of Affirmative Relief And, Consistent With This Court's Precedents, Such Relief Does Not Maintain Racial Or Gender Balance Within The Fire Department.

Petitioner relies on the District Court's statement in its February 26, 1987 order that the injunctive relief contained therein would not include affirmative race- or gender-conscious remedies, Pet. App. 128a - 129a, for the proposition that the affirmative relief later afforded by the Consent Decree is unlawful. This reliance is entirely misplaced, as it rests on a fundamental misapprehension of this Court's clear precedents on this point.

Leaving aside petitioner's seriously mistaken assertions as to the extent of unremedied discrimination within the Department prior to entry of the Consent Decree,[16] it is settled that consent decrees

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16 *See, e.g.*, the Court of Appeals' discussion of the inadequacy of the relief resulting from the *WACO* litigation, Pet. App. 13a - 14a. In this connection, petitioner appears simply to argue its disagreement with the factual findings of the courts below on this point. However, it is the established practice of this Court that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Tank Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). Review should not be granted on the basis of petitioner's fact-bound contention without an "obvious and exceptional" evidentiary showing plainly lacking here.

may provide broader relief than that which the court could have awarded after trial. *Local 93*, 478 U.S. at 525-26.

Consistent with *Local 93*, it is apparent that the District Court's statement in its February 26, 1987 order as to the scope of permissible relief was made in the context of the involuntary injunctive relief it ordered on that occasion.[17] The court did not purport to assess the appropriateness of affirmative relief within the framework of a voluntarily adopted consent decree, since that was not the question before it that day.[18] Indeed, in its June 10,

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17 Indeed, it is clear that the District Court was using the "persistent or egregious discrimination" standard applicable to court-ordered affirmative relief enunciated in *Local 28 of Sheet Metal Workers Int'l Assn. v. EEOC*, 478 U.S. 421, 445, 475-76 (1986). What is more, as the District Court noted, by the time the Consent Decree came before the court for approval the record had been augmented with additional evidence of racial harassment that had occurred since the court's previous order, see, e.g., Pet. App. 70a.

18 Petitioner states that "[t]he District Court specifically recognized in its order of February 26, 1987, that the City's abandonment of the 1982-83 entry-level examination and the 1984 promotional examinations eliminated any claim by the females and minorities who took those examinations that they had been denied individual employment opportunities in violation of Title VII." Pet. for Cert. 23 - 24. This is a significant misrepresentation of the District Court's order. The order was in response to plaintiff-intervenors' motion for partial summary judgment based on the City's cancellation of those examination procedures. Pet. App. 105a - 106a. Plaintiff/intervenors had argued that the cancellation of the examinations itself denied minority and women applicants employment opportunities and perpetuated past discrimination. *See, e.g.*, Pet. App. 116a - 123a. Thus, petitioner's semantic attempt to portray the District Court as concluding that plaintiff/intervenors' claims of discrimination had been "eliminated" is patently flawed. Indeed, the court specifically addressed this contention:

> Certain of the defendants suggest as a threshold consideration that since the City voluntarily withdrew the examinations prior to any use for hiring purposes, the absence of a discriminatory result must preclude any finding of illegal activity and thus bar the award of relief.

(footnote continued on following page)

1988 Memorandum and Order approving the Decree, the court specifically distinguished between the two forms of remedies. Pet. App. 70a.[19]

Moreover, contrary to petitioner's suggestion, the evidence of discrimination before the District Court more than justified the affirmative relief contained in the Consent Decree, consistent with the standards set out by this Court in *Johnson and Wygant*. *Johnson* held that employers implementing voluntary affirmative action plans "need point only to a 'conspicuous . . . imbalance in traditionally segregated job categories'" in order to satisfy Title VII concerns. *Johnson*, 107 S. Ct. at 1451. Likewise, *Wygant* established that a "strong basis in evidence" may justify such voluntary policies on equal protection grounds. *Wygant*, 476 U.S. at 277-78. The District Court as well as the Court of Appeals found that both of these tests had been met by the Consent Decree. Pet. App. 14a - 15a, 17a and 70a.

Petitioner also intimates that the affirmative relief provided by the Consent Decree is designed to permanently maintain, rather than simply attain, racial and gender balance within the Depart-

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Pet. App. 124a. Rejecting this assertion, the District Court went on to enjoin the City, inter alia, from unlawfully discriminating against employees or applicants with the Department, and from using any tests that had adverse impact against protected groups. Pet. App. 131a. The court also noted that whether or not the cancellation of the examinations "averted the infliction of compensable injuries" on applicants was a question that could only be resolved at trial. Pet. App. 125a. Thus, petitioner's suggestion that the District Court found plaintiff-intervenors' claims to have been "eliminated" is misleading and entirely fallacious.

19 For this reason, petitioner's reliance upon *Local 28* is misplaced. As has been previously noted, *Local 28* involved affirmative, race-conscious relief that was imposed upon the employer by the court, not a voluntarily-established plan. Even assuming arguendo that the affirmative relief here had been court-imposed, however, such relief would have been amply justified. See *Paradise*, 107 S. Ct. 1053 (court-ordered, race-conscious promotion requirements permissible where employer had consistently failed to comply with consent decrees and court orders to remedy past discrimination).

ment. However, the simple facts that the Decree has a temporary, limited duration, *see, e.g., Johnson*, 107 S. Ct. at 1456, and that the promotional remedies petitioner complains of here are of a "one-time" nature, make the inaccuracy of this claim obvious.[20]

Because petitioner's question presents no unresolved issues of law, review thereof by this Court is unnecessary.

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20 Notwithstanding the above, as it is undisputed that labor force parity has not been attained by the Department in any job category, the claim that the Consent Decree would function to maintain such parity is unripe and non-justiciable.

CONCLUSION

For all of the reasons set forth above, the petition for writ of certiorari should be denied.

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